

OPINION
73-242

May 4, 1973 (OPINION)

The Honorable Arthur A. Link
Governor
State Capitol
Bismarck, ND 58502

Dear Governor Link:

This is in reply to your letter of May 1, 1973, which you address to this office in your capacity as chairman of the Emergency Commission. You state the following facts and questions:

"At present, the Emergency Commission has before it an application from the North Dakota Workmen's Compensation Bureau to accept and expend federal funds for the 'state administration of the Occupational Safety and Health Act of 1970.'

"The Workmen's Compensation Bureau was designated by Governor Guy on March 16, 1971, as the agency to be responsible for the administration of the Occupational Safety and Health Act in North Dakota. In accordance with such designation, the bureau did apply for and receive federal funds for the development of a state plan.

"A plan was developed and gained the approval of the Secretary of Labor. The plan in question did anticipate the passage of Senate Bill No. 2115, which would give legal status to a state administered program. The Legislative Assembly defeated Senate Bill No. 2115. On the other hand the legislature did pass House Concurrent Resolution No. 3074., which authorizes and directs the Legislative Council to study the feasibility of state administration of the Occupational Safety and Health Act.

"As a result of legislative actions involving the state's administration of the Occupational Safety and Health Act, and in view of the language in section 56-16-14.1 of the North Dakota Century Code regarding the legislative 'intent to reject federal funds', a question exists as to what authority and responsibility the Workmen's Compensation Bureau has to continue its relationship with the federal government.

"My question is, in light of this information, can the Emergency Commission legally permit the Workmen's Compensation Bureau to accept and expend federal funds for continuing planning and administration of the Occupational Safety and Health Act?"

Section 54-16-04.1 of the North Dakota Century Code, as amended, which we believe is the section to which you have reference, provides in part:

" * * * The emergency commission with the advice and counsel of

the executive office of the budget may authorize the state treasurer to receive, between legislative sessions, any moneys for new programs not appropriated by the legislative assembly that are made available by the federal government, or any agency thereof, which the legislative assembly has not indicated an intent to reject. The emergency commission may authorize any state agency, department, board, or institution to expend such moneys from the date such moneys become available until July first following the next regular legislative session; * * * "

Senate Bill No. 2115, which was passed by the Senate but indefinitely postponed by the House, provided in part in section 3:

"The bureau is authorized and empowered within the limits of this title to make all contracts and to do all things necessary to cooperate with the United States government, and to qualify for, accept, and disburse any grant from the United States government intended for the administration of this chapter."

House Concurrent Resolution No. 3074, which was adopted by both the House and the Senate, directs the Legislative Council to conduct a study to determine the feasibility of state administration of the Occupational Safety and Health Act. The resolution states in part:

"WHEREAS, in the event that the Forty-third Legislative Assembly fails to adopt Senate Bill No. 2115 which provides for state administration of the Occupational Safety and Health Act, its administration will then be carried on by the federal government; * * * "

The legislature did, of course, fail to enact Senate Bill No. 2115, as noted in your letter.

Section 54-16-04.1 of the North Dakota Century Code was enacted in 1967 as a result of the recommendation of the Legislative Audit and Fiscal Review Committee. (See chapter 385, 1967 Session Laws.) The 1967 report of that committee states, at page 10:

"Federal funds flowing in the state fall into two general groups -- categorical grants and special purpose project grants. Categorical grants are awarded to the state for general purposes such as health, rehabilitation, and welfare, and require state matching funds. Special project grants are given to the state for a specific purpose such as research. These special grants generally require the state to do the work. The federal government pays the cost and the state is expected to supply space, utilities, supervision, and accounting records.

"It is a basic principle that the legislature has the constitutional responsibility for the appropriation of all state moneys and the programs for which these moneys are spent. At the present time, however, state agencies are receiving federal funds during the interim between sessions which may commit the state to matching funds without prior legislative approval of the program.

"The scope of the problems involved in the proper administration of federal funds is far reaching and will require the implementation of many new techniques in the budgeting process. The committee has made a move forward in this direction, however, by recommending legislation which will require agencies and departments to receive authority from the Emergency Commission, with the advice and counsel of the Department of Accounts and Purchases, before receiving spending federal funds not previously anticipated by the legislature."

The proposal of the Legislative Audit and Fiscal Review Committee was in the form of Senate Bill No. 553 which was enacted and became section 54-16-04.1 of the North Dakota Century Code.

The question of whether the Legislative Assembly has indicated an intent to reject certain federal funds is in the nature of a question of fact as well as question of law. We do not presume to substitute our judgment in the matter for that of the Emergency Commission since the legislature has delegated this responsibility to the Emergency Commission. However, the action of the legislature in rejecting Senate Bill No. 2115, which contained a provision permitting the Workmen's Compensation Bureau to receive the federal funds, as well as the legislative action in adopting House Concurrent Resolution No. 3074, which assumes that the failure to adopt Senate Bill No. 2115 will result in the administration of the Occupational Safety and Health Act by the federal government, is, in our estimation, conclusive and leaves little discretion for the Emergency Commission to exercise.

In direct response to your question, it is our opinion, from the facts presented to us, that the Emergency Commission has no legal basis for permitting the Workmen's Compensation Bureau to accept and expend federal funds for continuing planning and administration of the Occupational Safety and Health Act.

We believe one other item should, however, be noted. Section 54-16-04.1 of the North Dakota Century Code, as amended, provides the commission may authorize the expenditure of federal funds from the date such moneys become available until July first following the next regular legislative session. We cannot determine from the facts presented whether previous authorization to expend these funds has been granted. If such authority was previously granted, we believe the bureau has the authority to expend the federal funds received until July 1, 1973. Thus, we do not know whether this request is for a new authorization or whether the funds are, in fact, part of a previous authorization of the commission.

Sincerely yours,

Allen I. Olson

Attorney General